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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 856

EXCHANGE NATIONAL BANK OF CHICAGO,
A NATIONAL BANKING ASSOCIATION,
Petitioner,

vs.

HOMER A. BONHIVER, AS RECEIVER
OF AMERICAN ALLIED INSURANCE COMPANY,
AND SIDNEY P. ABRAMSON,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

PAGE

Citations of Authority i
Statutes and Rules Involved i
Question presented 1
Statement of the case 2
Argument 6
Appendices:
A. Statutes and Rules Involved A-1
B. Bank's motion to modify order of August 20, 1968 A-5
C. Portion of Bank's brief in support of motion to modify order A-8
D. Motion of receiver to dismiss Bank's appeal A-9
E. Memorandum of receiver in support of motion to dismiss appeal A-10
F. Portion of Bank's memorandum in opposition to receiver's motion to dismiss appeal A-13
G. Receiver's reply memorandum and affidavit A-14

CITATION OF AUTHORITY
STATUTES AND RULES INVOLVED

Rule 4(a) Federal Rules of Appellate Procedure ..... Appendix at A-1
Rule 5(a) Federal Rules of Appellate Procedure ..... Appendix at A-2
28 U.S.C. § 2107 ..... Appendix at A-2
28 U.S.C. § 1292(b) ..... Appendix at A-3
Rule 52(b) Federal Rules of Civil Procedure ..... Appendix at A-4
Rule 59(e) Federal Rules of Civil Procedure ..... Appendix at A-4

IN THE

Supreme Court of the United States

EXCHANGE NATIONAL BANK OF CHICAGO,
A NATIONAL BANKING ASSOCIATION,
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vs.

HOMER A. BONHIVER, AS RECEIVER
OF AMERICAN ALLIED INSURANCE COMPANY,
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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent, Homer A Bonhiver, as Receiver of American Allied Insurance Company, (hereinafter, "Receiver") respectfully opposes the issuance of a writ of certiorari to review the order entered in this case on October 14, 1968, by the United States Court of Appeals for the Eighth Circuit.

QUESTION PRESENTED

Whether notice of appeal filed with the clerk of the District Court more than thirty days after the entry of the order appealed from is timely.

STATEMENT OF THE CASE

Respondent Homer A. Bonhiver (hereinafter "Receiver") deems it necessary to supplement the Statement of the Case supplied by Petitioner Exchange National Bank of Chicago (hereinafter "Bank"). The Bank's Statement, and indeed its entire Petition, is based on the incorrect assumption that the Eighth Circuit dismissed the Bank's appeal from the District Court's order of August 20, 1968, on the sole ground that the order was interlocutory in nature and therefore not appealable. The Bank scarcely alludes to the presence of another ground—one which was fatal to its appeal: that is, the appeal was filed on October 2, 1968, more than 30 days from the entry of the order appealed from, and was therefore untimely. This issue was thoroughly briefed to the Eighth Circuit by both the Bank and the Receiver. It can be demonstrated that it was the sole and exclusive ground upon which the Mandate dismissing the appeal was predicated.

In order to establish the foregoing, it is necessary to bring to this Court's attention the issues raised and the arguments made by the Bank and the Receiver in connection with the motion to dismiss the Bank's appeal. We have therefore included appendices consisting of all or parts of the various motions, briefs and affidavits submitted by the parties in connection with the said motion.

After the entry of the District Court's order of August 20, 1968, the Bank, on August 27, 1968, served a motion asking the District Court to modify the order by certifying that it involved controlling questions of law as to which there were substantial grounds for difference of opinion and that an immediate appeal from the order would materially advance the ultimate termination of the litigation. (Appendix at A-5). The motion was brought pursuant to Rule 5 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 1292(b), which to-

gether provide a procedure whereby one might obtain an appeal from an interlocutory order if the District Court will certify the order as indicated, and if the Circuit Court will accept jurisdiction. The motion said that the order of August 20 "is interlocutory in nature, and, as such, is not otherwise appealable except as provided in Title 28 U.S.C. Section 1292 (b). It was supported by a brief which stated that the motion was brought pursuant to Rule 5(a), Federal Rules of Appellate Procedure. (Appendix at A-8). The District Court denied the motion. (See Appendix to Bank's Petition for Certiorari at C-28 through C-32).

The Bank on October 2, 1968 filed its Notice of Appeal from the order entered August 20, 1968. Receiver promptly filed its motion with the Eighth Circuit asking for dismissal of the appeal.[1] The motion stated:

> "1. Said notice of appeal was served and filed more than 30 days from the filing of the order appealed from;
>
> "2. The order appealed from is interlocutory in nature and therefore not appealable." (See Appendix at A-9).

The motion was supported by affidavit of the Receiver's attorney and by copies of the District Court's orders and memoranda of August 20 and September 24. It was further supported by a memorandum of law which contained arguments directed to (1) the finality of the court's order of August 20,

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[1] The Receiver in his motion asked the Court of Appeals to hear and decide the motion to dismiss forthwith, because the District Court, in its memorandum accompanying the order of September 24, 1968 denying certification, set down a time schedule for discovery and trial of the case as follows:

1. All motions to be heard by November 20, 1968;
2. All discovery to be completed by February 20, 1969;
3. The case to be placed on the court's trial calendar on April 20, 1969 and proceed to trial as rapidly as follows.

The Receiver was concerned that this schedule could not be complied with if the disposition of the motion were not expedited.

and (2) the untimeliness of the Bank's appeal (Appendix at A-10-11).

The Bank filed a memorandum of law in opposition to the Receiver's motion directed to the issues of the finality of the order of August 20, and the timeliness of the appeal. It said in its memorandum that at the time it sought certification of the order of August 20 it believed that the order was interlocutory, and that it later concluded that the order was final and appealable under the holding of *Mercantile National Bank at Dallas v. Langdeau,* 371 U.S. 555 (1963). As to the issue of timeliness of the appeal, the Bank argued that the time to appeal was extended by its motion to certify the order. For this proposition it cited Rule 4 of the Federal Rules of Appellate Procedure which provides in part that the running of the time for filing a notice of appeal is terminated by a motion under Rule 52(b) of the Federal Rules of Civil Procedure to amend or make additional findings of fact, and by a motion under Rule 59(e) to alter or amend a judgment. The Bank argued that its motion to certify the order of August 20 was under Rule 52(b) and Rule 59(e). That portion of the Bank's memo treating the issue of timeliness is set forth in the appendix herein at A-13.

The Receiver filed a reply brief and an affidavit pointing out that the Bank was aware of the case of *Mercantile National Bank at Dallas v. Langdeau,* including the holding on the issue of appealability, at least since May 13, 1968, long before it made its motion to certify. The Bank had extensively discussed *Langdeau* in a brief served on May 13, and there said that part of the opinion in *Langdeau* was devoted to the question of the appealability of orders relating to 12 U.S.C. § 94, the statute relating to venue of national banks. The Receiver further argued that the time for appeal from the order of August 20 had not been extended by the Bank's motion for

certification. The Bank's motion was not made pursuant to Rule 52(b) or Rule 59(e) of the Federal Rules of Civil Procedure, but was made pursuant to Rule 5(a) of the Rules of Appellate Procedure. The Reply memorandum and annexed affidavit are set forth in the appendix herein at A-14 through 19.

On October 14, 1968, the Eighth Circuit, without oral argument, entered its order dismissing the Bank's appeal. The court has authority to take such action under Rule 27(b) of the Rules of Appellate Procedure. The Circuit Court said in its order:

> "The Court has considered a motion filed by counsel for appellees requesting dismissal of this appeal together with supporting and opposing memorandums. Being fully advised in the premises, it is now here ordered that his appeal be, and it is hereby, dismissed.
>
> "Mandate Forthwith."

Under Rule 27(b) the Bank could have requested "reconsideration, vacation, or modification of such action," but it did not do so.

ARGUMENT

We think it clear from the foregoing that the Eighth Circuit dismissed the Bank's appeal solely because it was untimely. Whether or not *Langdeau* is determinative of the issue of finality, it at least raises a serious question about it. If finality of the order of August 20, 1968 were the only issue presented by the motion to dismiss the appeal, the Eighth Circuit would not, in all likelihood, have dismissed the appeal until oral arguments were heard and the court had given extended consideration to the issue.

On the other hand, the appeal was untimely on its face, and the Bank cited no authority to support its tenuous argument that the time was extended by the Bank's motion to certify. Nor is the argument supportable by reason or logic. The Bank's motion for certification was not made under 52(b) of the Rules of Civil Procedure because there were no findings to be amended; neither was it a motion under 59(e), because it was not a motion to alter or amend a judgment after trial. It was according to the Bank's own statement a motion under Rule 5(a) of the Rules of Appellate Procedure.

The bringing of a motion to certify an order pursuant to Rule 5(a) clearly cannot extend the time for appeal where the motion is denied. The motion is proper only where the order sought to be certified is interlocutory and not appealable. If the order is appealable, there are no grounds for the motion, it is wholly improper, and must be denied. Surely it cannot, under these circumstances, extend the time for appeal.[2]

Rule 4 of the Federal Rules of Appellate Procedure allows the District Court to extend the time for appeal upon a showing

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[2] Rule 5(a) of the Federal Rules of Appellate Procedure provides that where an interlocutory order is amended to include a certification, permission to appeal may be sought within 10 days thereafter. This extension is clearly understandable because the order is not appealable until it is so amended.

of "excusable neglect". The Bank did not move the District Court to exercise its discretion under this rule. In any event, the Bank could not make the necessary showing. There is nothing in the record to explain why the Bank did not appeal in time. It was fully aware of the *Langdeau* case, including the holding of that case on the issue of appealability, long prior to the time it characterized the order of August 20 as interlocutory and moved the District Court to certify it.

It is respectfully submitted that no grounds exist for the issuance of a Writ of Certiorari in this matter.

J. NEIL MORTON
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APPENDIX

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4.

APPEAL AS OF RIGHT—WHEN TAKEN

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new

trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 5.

APPEALS BY PERMISSION UNDER 28 U.S.C. § 1292(b)

(a) Petition for Permission to Appeal. An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.

28 U.S.C. § 2107 (portion)

§ *2107. Time for appeal to court of appeals*

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * * * *

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

28 U.S.C. § 1292(b)

§ *1292. Interlocutory decisions*

* * * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. As amended Oct. 31, 1951.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 52.

FINDINGS BY THE COURT

* * * *

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 59.

NEW TRIALS; AMENDMENT OF JUDGMENTS

* * * *

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

EXCHANGE NATIONAL BANK OF CHICAGO, A NATIONAL BANKING ASSOCIATION,

Plaintiff,

vs.

SIDNEY P. ABRAMSON,

Defendant,

and

HOMER A. BONHIVER, AS RECEIVER OF AMERICAN ALLIED INSURANCE COMPANY,

Intervener.

MOTION TO MODIFY ORDER OF AUGUST 20, 1968

To the Court above named:

Plaintiff respectfully moves the Court above named to modify its Order and Memorandum of August 20, 1968, granting leave to Intervener to file *nunc pro tunc* as of January 31, 1968, his Amended Answer and Counterclaims, which contains, as new matter, a Second Counterclaim, by supplementing said Order to certify that (a) said Order involves several controlling questions of law as to which there are substantial grounds for differences of opinion, and (b) an immediate appeal from said Order may materially advance the ultimate termination of the litigation.

The grounds of said Motion are that:

1. Said Order is predicated upon the resolution of multiple, controlling questions of law as to which the Court, in its Memorandum attached to said Order and filed simultaneously therewith, has acknowledged, in regard to at least two such propositions, that there is doubt as to which of conflicting authorities and rules of law should apply.

2. Said Order, sustaining this Court's jurisdiction to hear the issues raised in said Second Counterclaim, is interlocutory in nature, and, as such, is not otherwise appealable except as provided in Title 28, U.S.C. Section 1292(b), until there has been a final determination of issues raised in said Second Counterclaim resulting in a final judgment.

3. The subject matter of the Second Counterclaim is to a great extent substantially identical with the criminal charges set forth in an Indictment returned to this Court in United States v. Phillip Kitzer, Sr., et al. (3-66 Crim. 7), and tried in the District Court in North Dakota (455 Cr. (N.D.)), beginning March 20, 1967, and terminating after three months of trial in a verdict of acquittal on June 23, 1967.

4. Before the issues tendered in said Second Counterclaim can be brought to trial, extensive and time-consuming pretrial proceedings must be undertaken by plaintiff and defendants, contemplating, among other things, the following:

(a) Depositions of witnesses to determine the admissiblity or inadmissiblity of evidence,

(b) Depositions of witnesses for discovery of evidence,

(c) Pre-trial motions touching upon supression of evidence and,

(d) Pre-trial preparation and motions to be expected from the very complexity of the issues raised in the Second Counterclaim.

5. It is reasonable to assume that trial of the cause will consume several weeks of the time of the Court, the attorneys

and the parties, and plaintiff respectfully represents that therefore disposition of an interlocutory appeal would seem to be advisable in advance of such trial and pre-trial procedures.

6. Should it be determined upon appeal following final judgment, that the Order of August 20, 1968, was erroneously entered, the foregoing pre-trial procedures, and the trial itself will have been for naught, and the ultimate termination of the litigation would be very substantially delayed.

7. An immediate appeal from said Order, for the foregoing reasons, will materially advance the ultimate termination of the litigation.

Dated: August 27, 1968.

HAROLD C. EVARTS and
EDGAR BERNHARD
Attorneys for Plaintiff

(U.S. District Court Title)

BRIEF IN SUPPORT OF MOTION TO MODIFY ORDER OF AUGUST 20, 1968

This Court granted intervenor leave to file his Amended Answer and Counterclaims, *nunc pro tunc*, as of January 31, 1968. The pleading contained a "second counterclaim," not a part of the original proposed Answer and Counterclaim appended to intervenor's motion, which alleges facts upon which intervenor seeks to recover 10.5 million dollars in damages for fraud. By the very nature of the order permitting the second counterclaim to be filed, such order is interlocutory and is not a final, appealable order.

28 U.S.C. 1292(b), in pertinent part, provides:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . ."

The motion at bar is both timely and proper. Rule 5(a), Federal Rules of Appellate Procedure, provides that:

> "An [interlocutory] order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within ten days after entry of the order as amended."

* * * * *

Respectfully submitted,

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EXCHANGE NATIONAL BANK OF CHICAGO,
A NATIONAL BANKING ASSOCIATION,
Plaintiff-Appellant,

vs.

SIDNEY P. ABRAMSON,
Defendant-Appellee,

and

HOMER A. BONHIVER, AS RECEIVER OF
AMERICAN ALLIED INSURANCE COMPANY,
Intervenor-Appellee.

NOTICE OF MOTION AND MOTION TO DISMISS APPEAL OF PLAINTIFF-APPELLANT

To: Exchange National Bank of Chicago, Plaintiff, and Harold C. Evarts and Edgar Bernhardt, its attorneys; and Sidney P. Abramson, Defendant, and Theodore Collins, his attorney.

PLEASE TAKE NOTICE that Homer A. Bonhiver, as Receiver of American Allied Insurance Company, Intervenor-Appellee in the above captioned matter, will bring on for hearing before the United States Court of Appeals for the Eighth Circuit at the United States Courthouse in St. Louis, Missouri, the following motion:

Intervenor-Appellee moves the above Court: (1) to dismiss Plaintiff's appeal; and (2) that this motion be heard and decided forthwith.

The grounds for said motion are:

1. Said notice of appeal was served and filed more than 30 days from the filing of the order appealed from;

2. The order appealed from is interlocutory in nature and therefore not appealable.

Said motion is made upon the attached Affidavit of David C. Forsberg and upon all the files, records and proceedings herein.

DAVID C. FORSBERG
David C. Forsberg
Attorney for Homer A. Bonhiver,
Intervenor-Appellee

(U.S. Court of Appeals Title)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS APPEAL

I.

The order of August 20, 1968 of the District Court for the District of Minnesota, Third Division, is interlocutory and therefore not appealable as of right. This very fact was recognized by Plaintiff-Appellant in its motion to modify the order of August 20, 1968 when it stated, "Said Order sustaining this court's jurisdiction to hear the issues raised in said Second Counterclaim, is interlocutory in nature, and, as such, is not otherwise appealable except as provided in Title 28, U.S.C.

§ 1292(b), until there has been a final determination of issues raised in said Second Counterclaim resulting in a final judgment."

Plaintiff also stated in a brief in support of its motion to modify said order of August 20, 1968, the following, "By the very nature of the order permitting the Second Counterclaim to be filed, such order is interlocutory and is not a final, appealable order."

The lower court in its order dated September 24, 1968, which denied § 1292(b) certification, also recognized that its order of August 20, 1968 was an interlocutory order.

Pursuant to 28 U.S.C. § 1291 the courts of appeals have jurisdiction only of appeals from "final decisions" of the district courts. Jurisdiction over appeals from interlocutory decisions of the district courts comes only under 28 U.S.C. § 1292, and then only when certification has been made by the lower court, which certification has been denied in this matter.

Since Plaintiff-Appellants have conceded that the order in question is interlocutory, and since the lower court itself has recognized that its order was interlocutory, there is no issue as to that fact. Thus an appeal does not lie to the Court of Appeals under § 1291 because the order appealed from is not a final decision. No other statute, rule, or procedural vehicle remains upon which this appeal can escape dismissal forthwith by this Court.

II.

Plaintiff-Appellant's appeal is further subject to immediate dismissal due to its untimeliness. Rule 4 of the Rules of Appellate Procedure provides that the notice of an appeal from a district court to a court of appeals must be filed with the clerk of the district court within 30 days of the date of entry of the order appealed from. Plaintiff-Appellant filed its notice of appeal on October 2, 1968 and the order appealed from

was filed August 20, 1968. Thus more than 30 days had elapsed when the notice of appeal was filed. Rule 4 allows extension of the 30 day time limit only for timely motions under Federal Rules of Civil Procedure 50(b), 52(b), and 59, or upon a showing of "excusable neglect." None of those grounds exist on this appeal.

III.

This motion should be entitled to hearing and determination forthwith. Rule 27(b) of the Rules of Appellate Procedure provides that motions for procedural orders may be acted upon by the Court of Appeals at any time without awaiting a response thereto. This motion by Intervenor-Appellee for dismissal of Plaintiff-Appellant's appeal provides a most appropriate occasion for invoking that rule. Due to the apparent lack of issue before the Court as to the interlocutory nature of the order appealed from, and also due to the timetable ordered in this matter by the lower court, it is submitted that any further delay should be avoided if at all possible, by immediate hearing and determination of this motion.

Respectfully submitted,
David C. Forsberg
Attorney for Homer A.
Bonhiver, Intervenor-
Appellee

(U.S. Court of Appeals Title)

MEMORANDUM OF LAW IN OPPOSITION TO MOTION OF INTERVENOR TO DISMISS APPEAL

NO. 19469

EXCHANGE NATIONAL BANK OF CHICAGO ("Bank"), Plaintiff-Appellant, files this memorandum in opposition to the motion of HOMER A. BONHIVER, as Receiver of American Allied Insurance Company ("Receiver"), Intervenor-Appellee, to dismiss the Bank's appeal from the order of August 20, 1968.

* * * *

The Bank's Appeal Is Timely

On August 27, 1968, within ten days of the entry of the order of August 20, the Bank served its motion to amend the order of August 20. The Bank's motion to amend was denied by order dated September 24, 1968 and filed September 26, 1968.

If we are correct that the August 20 order was a final decision, then the motion to amend was a motion to make additional findings under Rule 52(b) of the Federal Rules of Civil Procedure, as well as a motion to alter or amend a judgment under Rule 59(e). In either case, under Rule 4 of the Federal Rules of Appellate Procedure, the Bank's 30-day period for appeal did not begin to run until the entry of the order on September 26.

The notice of appeal herein was filed on October 2—six days after the entry of the order.

Respectfully submitted,

(U.S. Court of Appeals Title)

REPLY MEMORANDUM OF INTERVENOR
No. 19469

The Bank in its Memorandum of Law herein says that it was originally its view that the Order of the lower court filed August 20, 1968, from which it now attempts to appeal, was interlocutory and not appealable; and that it was only after the Bank had read the case of *Mercantile National Bank at Dallas v. Langdeau,* 371 U.S. 555 (1963), that it arrived at the "studied conclusion" that the August 20 Order was final and appealable. The Bank at page 8 of its Memorandum says:

> "We, too, felt initially that the order of August 20 denying the Bank's venue plea was interlocutory. However, in the light of *Langdeau,* we now recognize, as we believe this Court should conclude, that *Langdeau* is controlling and that the order of August 20 is sufficiently final as to be appealable."

This suggests that the decision in Langdeau came to the Bank's attention only after it had made its motion for certification of the Order of August 20, and had taken the position that said Order was interlocutory. However, the affidavit of David C. Forsberg hereto annexed makes it clear that the Bank was fully aware of the *Langdeau* case, including that portion of it dealing with appealability of the Order, as early as May 13, 1968, long before it made its motion to certify. The Bank's brief in the matter of *Bonhiver v. Exchange National Bank of Chicago,* served on May 13, 1968, and signed by the same counsel who represent the Bank on this appeal, goes into extensive discussion of *Langdeau* at pages 2 and 3 and includes the following language:

> "A large part of the opinion [of *Langdeau*] is devoted to the question as to whether the order was appealable or not. That question was disposed of in favor of the position of the Bank's that it was appealable under 28 U.S.C. § 1257."

If the Bank is now seeking an extension of the time for appeal, it has clearly not made a showing of excusable neglect required by the rules.

Whether or not the Order of August 20, 1968, is final and appealable, the Bank did not serve and file its Notice of Appeal within the 30-day time limitation. It contends that the time for appeal was suspended because its motion to certify the Order of August 20 was actually a motion pursuant to Rule 52(b) and Rule 59(e). It was neither one; it was a motion pursuant to Rule 5(a) of the Rules of Appellate Procedure permitting the amendment of an order to include the statement prescribed by 28 U.S.C. § 1292(b). It was not a motion under 52(b), because there were no findings to be amended; neither was it a motion under 59(e), because it was not a motion to alter or amend a judgment after a trial.

The Bank's position is absurd. It contends that the Order of August 20 was final and appealable; if this be the case, the Bank had no right to move for amendment of the Order because 28 U.S.C. § 1292(b) expressly applies only to orders "not otherwise appealable," and the motion had to be denied. The Bank now contends that the motion, which was without any basis, nevertheless suspended the time for appeal.

It appears from the foregoing that the Bank's appeal must be dismissed.

Respectfully submitted,
DAVID C. FORSBERG
David C. Forsberg
Attorney for Intervenor-
Appellee

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EXCHANGE NATIONAL BANK OF CHICAGO, A NATIONAL BANKING ASSOCIATION,

Plaintiff-Appellant

vs.

SIDNEY P. ABRAMSON,

Defendant-Appellee,

and

HOMER A. BONHIVER, AS RECEIVER OF AMERICAN ALLIED INSURANCE COMPANY,

Intervenor-Appellee.

AFFIDAVIT OF DAVID C. FORSBERG

STATE OF MINNESOTA
COUNTY OF RAMSEY

David C. Forsberg being duly sworn on oath deposes and says that he is the attorney for Homer A. Bonhiver, the intervenor in the above-captioned matter; that in a matter entitled *Bonhiver v. Exchange National Bank of Chicago* in the United States District Court, District of Minnesota, Third Division, File No. 36-68 Civil 95, Exchange National Bank of Chicago served a brief upon the plaintiff on May 13, 1968, a true and correct copy of which is hereto annexed. Further affiant saith naught.

DAVID C. FORSBERG

(Jurat)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
3-68 CIVIL NO. 95

HOMER A. BONHIVER, AS RECEIVER FOR AMERICAN ALLIED INSURANCE COMPANY,
Plaintiff

vs.

EXCHANGE NATIONAL BANK OF CHICAGO,
Defendant.

BRIEF IN SUPPORT OF MOTION OF EXCHANGE NATIONAL BANK OF CHICAGO TO QUASH AND DISMISS

Defendant, EXCHANGE NATIONAL BANK OF CHICAGO, offers this Brief in support of its motion for the entry of an Order quashing purported service of summons upon it and dismissing the above entitled cause.

The motion rests upon two grounds, either of which Defendant submits is sufficient to require the relief requested.

I.

As appears from Defendant's motion, Defendant was, at the time this action was commenced, and is, a national banking association organized and existing under the laws of the United States. At all times since its organization it has had its principal office and place of business, and was and is located in the City of Chicago, Illinois. It has never been established or located in the State of Minnesota.

§ 94 of Chapter 12, U.S.C., R.S. § 5198, pertaining to national banking associations, provides as follows:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

The United States Supreme Court has held that the foregoing provision must be given a mandatory reading; that accordingly a national bank may be sued only where the bank is located.

In *Mercantile National Bank at Dallas v. Langdeau,* 371 U.S. 555, 9 L.Ed. 2d 523 (1963), a receiver for a Texas insurance company sued two banks and a number of other parties, alleging a conspiracy to defraud the insurance company. The trial court denied the motion of the banks to dismiss because of wrong venue. The Texas Court of Civil Appeals reversed, sustaining the motion of the banks. The Supreme Court of Texas reversed, affirming the judgment of the trial court, on the ground that the statute should be read as being permissive and not mandatory. On appeal to the Supreme Court of the United States this ruling was reversed and the banks' motion to dismiss was sustained.

A Texas statute, a part of the Texas Insurance Code, specifically provided that cases of this general type could be brought in the county where the receiver had been appointed. The United States Supreme Court held that the federal statute was to be interpreted as mandatory and was, of course, to be enforced as against a state statute.

A large part of the Opinion is devoted to the question as to whether the order was appealable or not. That question was disposed of in favor of the position of the banks that it was appealable under 28 U.S.C. § 1257.

The Supreme Court discussed the history of the federal statute, its predecessors, the amendments to it, etc., and finally stated, at Page 562 of the Opinion, that it could find nothing in the statute or its history or the cases to support the receiver's contention that the statute should be read as a permissive one rather than a mandatory one.

The case cited presents a far more difficult situation for resolution by the Court than the case at bar. In the cited case the plaintiff argued that if a bank can be sued only in the District in which it was established, then the receiver would be unable to sue in one action the two national banks who were defendants, since they were located in different counties in Texas. But the Supreme Court held that this was a matter for the Congress to consider, not the Court (Page 563). The Court, after analyzing all the federal statutes having to do with suits against national banks, concluded (Page 567) that nothing warrants the conclusion that Congress sought, even by implication, to relax the venue restrictions of Section 5198. (§ 5198 is Title 12, § 94, U.S.C.)

The rule holds notwithstanding the fact that a bank may be "doing business" within the jurisdiction in which the case is filed. The Court of Appeals has thus held in *Leonardi v. Chase National Bank of New York*, 81 F. 2d 19, 2d Cir. 1936, cert. den. 298 U.S. 677.

In that case the United States District Court held that the Chase National Bank could be sued in the Eastern District of New York, where it was operating a branch bank. The Court of Appeals reversed on the ground that the Chase National Bank had its principal office in the Southern District of New York and could be sued only there.

The case at bar again is a far clearer, simpler case than the *Chase National Bank* case. Despite the fact that the Chase was actually *doing a banking business* in the Eastern District of

New York, the Court of Appeals held, nevertheless, that it could not be sued there because that was not its principal place of business. Exchange National Bank, of course, has no branch in Minnesota or anywhere else; it was organized and established in Chicago, Illinois, and its principal and only place of business is there.

(In the *Chase National Bank* case, after the Bank made its claim of lack of jurisdiction it appeared generally and tried the case on the merits. But the Court held that the Bank had not waived the objection it had previously made as to jurisdiction.)

The statutory requirement and the cases uniformly interpreting it appear to be conclusive. Exchange National Bank is not subject to suit in any other jurisdiction than that in which its principal and only place of business is located.

II.

(Discussion of unrelated issue omitted).

Respectfully submitted,